JOHNSON *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 5247. Argued March 24, 1971—Decided April 5, 1971

138 U. S. App. D. C. 174, 426 F. 2d 651, certiorari dismissed as improvidently granted.

William J. Lippman, by appointment of the Court, 400 U. S. 940, argued the cause and filed briefs for petitioner.

Samuel Huntington argued the cause for the United States. With him on the brief were *Solicitor General Griswold*, *Assistant Attorney General Wilson*, and *Roger A. Pauley*.

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS joins, dissenting.

In the petitioner's trial on a charge of rape, the District Judge instructed the jury that it could return a verdict of guilty with the death penalty. Yet that verdict was constitutionally impermissible in light of this Court's decision in *United States* v. *Jackson*, 390 U. S. 570. See *Bailey* v. *United States*, 132 U. S. App. D. C. 82, 86 and n. 3, 405 F. 2d 1352, 1356 and n. 3. I think the extreme prejudice arising from this erroneous instruction requires reversal of the judgment of conviction and a remand of this case for a new trial. Cf. *Price* v. *Georgia*, 398 U. S. 323, 331–332.